No. 96-1324

Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1996

MARINA ZARNES,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

REPLY BRIEF FOR PETITIONER

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ARGUMENT

In responding to the Government's Brief of the United States in Opposition of Marina Zarnes' request for petition for certiorari, the following should be considered by this court.

Landgraf v. USI Film Products, 511 U.S. 244 (1994), clearly states that "When, however, the statute contains no such express command, the court must determine whether the new statute would have retroactive effect, i.e., whether it would impair rights a party possessed when he acted, increase a party's liability for past conduct, or impose new duties with respect to transactions already completed." Ibid. This is a cornerstone of the *Landgraf* decision.

The AEDPA did not provide any clarity, provision or other direction concerning the retroactive application of its subparts, or its impact, in terms of a one-year limitation on the filing of habeas corpus petitions. It can be safely assumed, because of Congress' lack of clear intent, that the AEDPA would only act as a new rule of law for those individuals whose cases were dispositioned in final form, after April of 1996. Thus leaving those individuals who have never filed a habeas corpus petition, or filed such a petition prior to April 26th, or even after April 26th, but whose cases were dispositioned long before April 26, 1997, the freedom to file their motions under the old rule "at any time".

Neither the Certificate of Appealability should be applied retroactively, nor should the questions relating

to the restrictions in filing 2255 motions, or for that matter, 2254 motions for cases whose dispositions and final determinations occurred before April, 1996. Without a clear retroactive intent, no portion of the Reform Act should apply retroactively, thus leaving all defendants, whose case was dispositioned prior to April, 1996, a clear opportunity to file such habeas petitions at any time consistent with the standards of review applicable to their case (old law). To do anything less would violate *ex post facto* protections.

The rights of habeas corpus review, of which 2255 pleadings have been described, as well as 2254 pleadings, is subject to the protection of the Suspension Clause of the Tenth Amendment. Therefore, without a constitutional amendment or a complete change in the Tenth Amendment, there can be no application of the AEDPA, either in form or substance. Certainly there should be no retroactive impact on defendants who have lingered in the prison systems prior to the enactment of the AEDPA who have not yet filed a 2255 or 2254 petition.

As the government states, Section 102 does not restrict the scope of relief available under Section 2255, but merely controls the availability of appellate review. This is also a misnomer in relationship to the Act itself. Any restriction on even a portion of the Act to apply retrospectively is a violation of the Suspension Clause of the Tenth Amendment, as well as *ex post facto* amendments. There cannot be a bifurcation of the AEDPA. There was no intent by Congress to bifurcate its application retrospectively, much less an intent

shown that the Act, or a part thereof, should apply retroactively.

This court should decide whether or not the transition of any habeas corpus relief violates the Suspension Clause of the Tenth Amendment and whether or not Congress' intent under the AEDPA was to make the Act itself retroactive, in whole or in part. Such confusion cannot be tolerated at the expense of those whose liberty is at stake and whose lives are protected by the Constitution and laws of this country.

The government suggests that there will be no impact, and/or no effect, on the outcome of cases already involving constitutional claims. This would be an incorrect statement of fact. The district court, in Waco, Texas, has dismissed a petition for habeas corpus relief on the basis of the filing of such document, even prior to April, 1997, claiming such filings violate the AEDPA. See ***United States v. Blue***, Case No. W-96-CA-410 (W.D.Tx. 1997).

The case before the court does not have a simple answer and the only way that Petitioner Zarnes, and others, can be protected is for this court to review the matter in its entirety, formulating an opinion and guidance for all of the courts to follow concerning the retroactive application of the AEDPA in whole or in part. Without a clear intent from Congress, there can be no other interpretation but that the Act can only affect those whose cases are dispositioned in final form after April 23, 1996.

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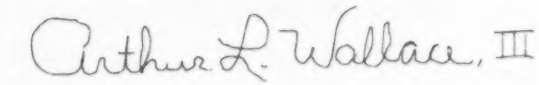
CONCLUSION

WHEREFORE, petitioner prays this court will grant her Petition for Certiorari and review the matter accordingly and provide such relief as the court deems appropriate.

Respectfully submitted,



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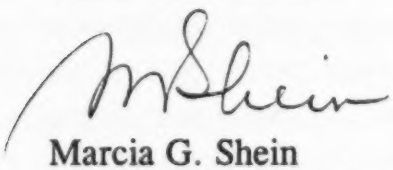

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